

Registration under Section 2(f)

Applicant requests that the mark be registered under Section 2(f), on the basis that the mark has become distinctive in connection with Applicant's goods.

The mark consists of the product configuration of Apple's iPhone digital mobile device. The iPhone device is unique in appearance, with a different look than any other cellphone on the market. The public has come to recognize the appearance of the iPhone device as a trademark by virtue of the enormous publicity surrounding Apple's announcement and launch of the product, and its unprecedented success in the marketplace. As detailed below, sales of the iPhone device reached the 1 million mark after only 74 days of sales. The image of the product has become well-known to consumers not only because the product already has a million-plus users, but because images of the device have been featured in news media, on the web, and in a much-admired marketing campaign. With front-page coverage in national newspapers, lead stories on network TV newscasts, and comic parodies on late-night television and YouTube, the iPhone device received an estimated \$400 million in free advertising. As a result, consumers who see the image of the device immediately recognize it as Apple's iPhone, and the configuration of the product serves as an indicator of source.

The Trademark Manual of Examining Procedure provides that the configuration of a product can be registered with evidence of acquired distinctiveness (§1202.02(b)(i)), and the Trademark Trial and Appeal Board has recognized that product configurations can achieve secondary meaning in a variety of decisions in which it reversed refusals to register such designs. *See, e.g., In re The Black & Decker Corp.*, 81 USPQ2d 1841 (TTAB 2006) (key design); *In re Haggard*, 217 USPQ 81 (TTAB 1982) ("black swatch" design for clothing); *In re Motorola, Inc.*, 3 USPQ2d 1142 (TTAB 1986) (two-way radio transceivers).

There is no minimum amount of time necessary for a mark to achieve acquired distinctiveness. *See McCarthy on Trademarks*, 15:55 (2007). Indeed, Professor McCarthy states that public recognition of a mark can be established "comparatively overnight" and that the seller of a product can develop secondary meaning "almost immediately after launching a new product." *Id.* McCarthy further observes that, with massive national advertising campaigns in both television and print, a mark can achieve secondary meaning "within a matter of days or weeks, compared to the many years required in the days of more leisurely advertising." *Id.* At 15:56. *See also Hunter Publishing Co. v. Caulfield Publishing Ltd.*, 1 USPQ2d 1996, 1999 (TTAB 1986). The introduction of the iPhone is a textbook example of the speed with which a mark can achieve secondary meaning in today's media environment.

Case law confirms that product configurations can achieve acquired distinctiveness very quickly. For example, in *Selchow & Righter Co. v. Decipher, Inc.*, 598 F.Supp. 1489 (E.D.Va. 1984), the court held that the trade dress for the Trivial Pursuit board game,

released in November 1982, had acquired distinctiveness by 1984 based on "unprecedented success in the marketplace," including sale of 1 million units during the first year of sales, and numerous newspaper and magazine articles written about the product. The iPhone device has been much more of a marketing phenomenon than Trivial Pursuit, achieving 1 million in sales in less than 3 months and attracting front-page news coverage at its pre-launch announcement and against at its introduction.

Such attention is nothing new -- Apple products have a history of achieving distinctiveness very rapidly. For example, the application to register the product configuration for Apple's "iPod nano" device (SN 78/925,932), which claimed first use in commerce on September 7, 2005, was approved for publication on the basis of acquired distinctiveness on September 13, 2007. Similarly, the application to register the product configuration for Apple's iMac G4 personal computer (RN 2,876,046), which claimed first use in commerce on January 7, 2002, was approved for publication on the basis of acquired distinctiveness on March 22, 2004. See Exhibit A. The iPhone configuration has received even more media exposure and public attention in a short time than either of these products.

Applicant respectfully submits that the product configuration of the iPhone, like the product configuration of these other Apple products, has achieved secondary meaning, for the following reasons.

1. Product sales.

Apple introduced the iPhone mobile digital device to consumers on June 29, 2007 at approximately 160 Apple stores and 1800 AT&T stores nationwide. The product was an immediate success. 270,000 units of the iPhone device were sold in the first two days alone, and more than 1 million units were sold within 74 days. See "Declaration of Thomas R. La Perle in Support of Acquired Distinctiveness," ¶6 (hereinafter "Declaration"). Thus, well over a million people in America use the iPhone product, and countless others have seen the product in use.

2. Pre-launch publicity and marketing

The distinctive appearance of the iPhone device is recognized far beyond those who have purchased or used the device. In fact, even before the product went on the market, the unique look of the iPhone device was well-known to U.S. consumers.

Apple first announced the iPhone product to the public in January 2007, but that announcement was preceded by years of industry and consumer speculation about the possibility that Apple was developing a mobile device that combined the functionality of an iPod media player with cellphone capability and other features. See Declaration at ¶ 2. *The New York Times* reported rumors of an Apple cellphone as early as August 2002, and over the next 4 1/2 years the general public was exposed to extensive

speculation about the iPhone product in a variety of media. See Exhibit B. Interest in the product was particularly intense because of the phenomenal success of Apple's iPod media player, of which more than 100 million units have been sold since November 2001.

Thus, when Apple finally announced its plans to launch the iPhone device on January 9, 2007, it was big news. As indicated by the materials at Exhibit C and Exhibit D, pictures of the product appeared on the front pages of *The New York Times*, *USA Today*, and many other newspapers, and in stories on national television news and in newsmagazines. Apple's announcement was available for viewing on the web, and featured large color images of the product. See Declaration ¶¶ 3. As a result, millions of U.S. consumers knew what the iPhone device looked like months before the product went on sale.

The profile of the iPhone device only grew in the months before product launch, as evidenced by the materials at Exhibit E:

- According to independent research conducted by Nielsen//NetRatings, the iPhone section of Apple's web site received more than 1.79 million unique visitors in January 2007 alone, and more than 980,000 unique visitors in each of February and March. The image of the iPhone device was prominently displayed at that section of the site.
- Reuters reported that by late March 2007, more than one million emails seeking information about iPhone had been sent to AT&T, the exclusive telecom carrier for the product.
- An officer at Nielsen Buzzmetrics reported that the Internet traffic generated by the iPhone product was "higher than any product we've monitored," who indicated that the number of online "blog" posts about iPhone was higher than posts about Super Bowl commercials, the finale of *The Sopranos*, or announcements about Nintendo's Wii and Microsoft's Zune and Vista.
- By April 2007, an independent survey by measurement firm M:Metrics, Inc. revealed that nearly two-thirds (64%) of American mobile phone users were aware of the iPhone product, and a projected 19 million Americans had a strong interest in buying it. M:Metrics analyst Mark Donovan remarked, "That kind of latent demand is something I don't think we've ever seen before."
- In another April 2007 survey by the independent firm ChangeWave Research, Apple's iPhone was tied with another company's long-established brand, BlackBerry, as the top choice in a survey of people who planned to buy an advanced mobile phone within the following three months.

- A June 27 article in the *New York Times*, published just prior to the product's launch, reported that "[i]n the last six months, Apple's iPhone has been the subject of 11,000 print articles, and it turns up about 69 million hits on Google."
- According to Professor David Yoffie of Harvard Business School, attention to the iPhone product from newspapers, web sites, and other sources was "unprecedented," equating to \$400 million in free advertising in the months following Apple's announcement. Professor Yoffie observed that "no other company has ever received that kind of attention for a product launch."

Apple not only enjoyed the immense publicity for the iPhone product generated by third parties, but promoted the product with its own marketing campaign featuring print and television advertising prior to launch, beginning with a much-discussed commercial during the 2007 Academy Awards broadcast. See Exhibit F and Declaration at ¶ 4.

A commentator from CNET News described the iPhone marketing campaign as "Apple's best marketing campaign ever, and maybe one of the best ever in American business." Similarly, a commentator on Bloomberg.com said that the campaign "may be the most successful marketing effort ever, surpassing the drive to promote Ford Motor Co.'s 1964 Mustang and Microsoft Corp.'s Windows 95." See Exhibit G.

Thus, the iPhone device had achieved extraordinary public awareness and identification as an Apple product even before the product was launched. The appearance of the device had clearly obtained widespread recognition and acquired distinctiveness among American consumers even before the product was first sold to the public.

3. Launch publicity and marketing

The iPhone device appeared in countless stories in the media between the January 2007 announcement and the June 2007 launch, with images of the product prominently featured in many stories. See Exhibit H.

The product went on sale on June 29, 2007, and it was a front page news in *The New York Times* and *USA Today*, each of which featured pictures of the device. The launch received extensive press coverage in other publications across the nation, many of which published prominent images of the product. See Exhibit I. It was a leading story on all three network newscasts, as well as countless cable and local news broadcasts. Prospective purchasers camped out in front of retail stores days in advance, and giant replicas of the iPhone device in Apple store windows counted down the minutes until the product went on sale at 6 p.m. News crews interviewed the first purchasers live on television, displaying the product to viewers around the nation. See Declaration at ¶ 5.

Each iPhone is sold in a box and totebag which features the distinctive look of the product against a stark black background. See Exhibit J.

The product received another wave of press several days after launch, when the product was in consumers' hands. Reviews of the product were glowing:

- "The iPhone is revolutionary" (*New York Times*)
- "The iPhone is on balance a beautiful and breakthrough handheld computer" (*Wall Street Journal*)
- 3 1/2 stars (out of 4) (*USA Today*)

Overall pre-launch and post-launch interest was so high that *The New York Times* alone ran more than a dozen stories each in June 2007 and in July 2007. *Times* tech columnist David Pogue created a humorous video for the site, which was re-posted on YouTube and received nearly 1 million viewings. CBS News "A Closer Look at the iPhone" received 6.7 million viewings on YouTube. See Exhibit K.

The iPhone device was an immediate sales success, and on September 10th Apple announced that it had sold 1,000,000 units in just 74 days. See Exhibit L.

Apple's iPhone commercials have appeared on the major broadcast networks (ABC, CBS, NBC, FOX, CW) and cable, and the print advertisements have appeared in leading magazines. In addition AT&T, the exclusive telecom carrier for the iPhone device, has run extensive national advertising for the product. As indicated by the materials at Exhibit M, the image of iPhone device is the most prominent element in these commercials and print advertisements. Although Apple's specific advertising expenditures are not public, the company in 2006 spent \$338 million on advertising. Extensive information about the product has appeared on Apple's website, attracting large numbers of web visitors. See Declaration at ¶ 7.

The product continues to garner press attention, as the U.S. press covers Apple's plans to roll out the product in other countries. These stories often feature the image of the product as the primary illustration. See Exhibit N.

4. Recognition by consumers.

As a result of this extraordinary amount of press, publicity, and sales success, the image of the iPhone is unquestionably recognized by the public as an indicator of source.

Consumers have posted pictures of their iPhones on the web, and have created and posted their own videos about the iPhone device. See Exhibit O.

Political cartoonists commented on the success of the iPhone product, and also used the appearance of the iPhone as a device to comment on other current events. See Exhibit P. Needless to say, cartoonists rely on the public to recognize the subject matter they are depicting, even though it's presented in caricatured form -- if the public is not familiar with the subject matter, they won't get the joke. It's clear from these cartoons that cartoonists knew the public was familiar with the look of the iPhone device and would recognize the product in cartoon form, even when the IPHONE mark wasn't mentioned and was replaced with the word "IRAQ".

Television spoofs of the iPhone device also evidenced the widespread public recognition of the product and built on that recognition. A video originally broadcast on NBC's *Late Night with Conan O'Brien* received over 6 million viewings when posted on YouTube, and a skit from NBC's *Saturday Night Live* had over 1.2 million viewings on YouTube. See Exhibit Q. The huge number of viewers who have watched these videos evidences the high level of consumer interest in the device and the strong recognition of the product configuration as an indicator of source.

Conclusion

For all of the foregoing reasons, the introduction of Apple's iPhone device was a landmark event in the history of American consumer products. It was also an extraordinary event from a trademark standpoint, because few product designs have ever received so much national publicity and consumer attention in such a short time. The design of the iPhone device was not just well-recognized, but recognized as distinctive. Time and again, news stories in leading publications such as *The New York Times*, *International Herald-Tribune*, and *PCWeek* used the word "distinctive" to refer to the design of the iPhone device. See Exhibit R.

From a trademark law standpoint, the product's configuration has unquestionably acquired distinctiveness. As such, it merits registration on the Principal Register under Section 2(f). The Office must resolve any doubts as to the sufficiency of Applicant's evidence of acquired distinctiveness in Applicant's favor. See In re Merrill Lynch, Pierce, Fenner & Smith, Inc., 4 USPQ2d 1141 (Fed. Cir. 1987). Here, Applicant has clearly demonstrated that the mark has become distinctive, and Applicant respectfully requests that the Office allow registration of the mark on the Principal Register.